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## Touro Law Review

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Volume 22 | Number 3

Article 1

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June 2014

### Dred Scott: A Nightmare for the Originalists

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#### Recommended Citation

Wachtler, Sol (2014) "Dred Scott: A Nightmare for the Originalists," *Touro Law Review*: Vol. 22 : No. 3 , Article 1.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol22/iss3/1>

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## DRED SCOTT: A NIGHTMARE FOR THE ORIGINALISTS

*Honorable Sol Wachtler\**

### I. INTRODUCTION

The most important qualification for a judge, according to President George W. Bush and the Right Wing of the Republican Party, is that a judge not be an “activist”—that he or she recognizes that the United States Constitution must be interpreted both as it was written and as it was intended to be applied by its Framers.<sup>1</sup> Judges and others who adhere to this school of “original interpretation of the Constitution” are called “originalists.”<sup>2</sup> Before Justices Roberts and Alito joined the Supreme Court, Justice Scalia bemoaned the fact that

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<sup>1</sup> David E. Sanger, *Court In Transition: Washington Memo; In Reading Bush on Court, Words Don't Always Help*, N.Y. TIMES, July 5, 2005, at A15 (“There have been many times in [George W. Bush's] presidency that his views of the judiciary were very clear. While he rejected the idea of a litmus test for Supreme Court nominees during last years campaign, he has denounced ‘activist judges’ who ‘legislate from the bench.’”).

<sup>2</sup> See Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of ‘This Constitution’*, 72 IOWA L. REV. 1177, 1182-83 (1987) (“[Proponents of originalism] have argued, with varying degrees of rigor and sophistication, that the Constitution legitimately can be interpreted to mean only what the framers originally intended it to mean in the period 1787-1789 when it was drafted, proposed, and ratified.”); see also H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (adding that many judges and commentators believe that original

he and Justice Thomas were the only true “Originalists” on the Supreme Court bench.<sup>3</sup>

This Article traces the evolution of originalist doctrine; primarily focusing upon the impact of the Supreme Court’s 1857 decision in *Scott v. Sandford* (“*Dred Scott*”).<sup>4</sup> Part II explores the application of originalist doctrine to contemporary matters. Part III concentrates on the historical significance of the *Dred Scott* decision and its aftermath. Part IV discusses the state of originalism in twentieth century society.

## II. CONSTITUTIONAL INTERPRETATION: THE PRINCIPLES AND IMPRACTICAL APPLICATION OF MISGUIDED ORIGINALISM IN A MODERN WORLD

This Part defines the “originalist” view and compares it to the “dynamic” interpretation method. Then, this Part discusses the relative impracticability of employing the “originalist” view in a modern world—particularly given that knowledge of the Founding Fathers’ true intent, for the most part, died with them many years ago. Finally, this Part analyzes recent United States Supreme Court decisions and discusses how so-called “originalist” judges have engaged in what has been defined as judicial activism.

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interpretation was expected by the drafters of the Constitution).

<sup>3</sup> See Adam Liptak, *In Re Scalia the Outspoke v. Scalia the Reserved*, N.Y. TIMES, May 2, 2004, at 11 (quoting Justice Antonin Scalia, “I am a textualist . . . I am an originalist.”); see also Edward J. Sullivan & Nicholas Cropp, *Making it Up – “Original Intent” and Federal Takings Jurisprudence*, 35 URB. LAW. 203, 205 (“Justice Scalia is unabashed in his criticism of certain members of the Supreme Court for their continuing insistence that the Constitution is a ‘living’ document, the meaning of which changes with the passage of time, suggesting that such arguments are a mere mask for judicial activism.”).

<sup>4</sup> 60 U.S. 393 (1857).

### A. Originalism Defined

The “originalists” contend that to allow the interpretation of the Constitution to vary with changing generations would render our national charter meaningless.<sup>5</sup> They contend that the United States Constitution should not be cut to fit the fashion of the day, and that it should mean what its Framers meant it to mean and not what any particular Supreme Court bench wanted it to mean.<sup>6</sup> The “originalist” claims the amendment process gives the Constitution enough flex in the joints to change with the times.<sup>7</sup> They will tell you that the Thirteenth Amendment abolishing slavery and the Nineteenth Amendment enfranchising women prove that the proper method to change fusty or even abhorrent sections of the Constitution is through the amendment process.<sup>8</sup>

Those who favor a more “dynamic” view of the Constitution prefer using the Constitution as a template, not a tether.<sup>9</sup> They believe

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<sup>5</sup> See Clinton, *supra* note 2, at 1182-83.

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

<sup>8</sup> See Powell, *supra* note 2, at 907 (discussing the Federalist’s original mode of interpretation of the Constitution and stating that “[w]hen interpretation was necessary, it would take place in accord with the rules of ‘universal jurisprudence,’ subject to correction by the amendment process provided for in article V.”).

<sup>9</sup> See Lawrence C. Marshall, *Contempt of Congress: A Reply to the Critics of an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 2467, 2478 (1990) (“The Constitution is replete with clauses that call on the courts to apply norms to ever changing political and social circumstances. Consistent with the notion of the Constitution as a living document, definitions and applications of terms like ‘due process,’ . . . evolve over time.”); see also Justice Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution, Speech Delivered at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii* (May 6, 1987), reprinted in 10 HARV. L. REV. 1, 5 (1987) (“We will see that the true miracle was not the birth of the Constitution, but its life, a life nurtured through the turbulent centuries of our own making, and a life embodying much good fortune that was not.”); Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall’s Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495, 500 (1994) (discussing the fact that Justice Thurgood Marshall’s legal

that the Constitution should remain the inviolate foundation of our judicial house, but that some home improvements are necessary from time to time to keep the house livable in modern times.<sup>10</sup> They feel that the Framers had excellent vision but poor eyesight—their aspirations were prescient, but their implementation of those aspirations in their lifetimes was vitally flawed due to concepts such as slavery and legalized misogyny, which should be unacceptable to our modern sensibilities.<sup>11</sup> They argue that President Lincoln captured the need to treat our founding documents as living writings when he called in his Gettysburg Address for a “new birth” of freedom to fulfill the vision of our Founders that they themselves were unwilling or unable to fulfill.<sup>12</sup>

The “dynamic” or “living document” view of the Constitution holds that it was never meant to bind a twenty first century society to eighteenth century sensibilities, technology, and world Zeitgeist.<sup>13</sup> They agree with the “originalist” that the Framers would be shocked at some of the Supreme Court decisions interpreting the Constitution.<sup>14</sup> Doubtlessly, the Framers would have been shocked at

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ideology was consistent with the notion “that the Constitution was a ‘living document’ and that the law was a tool to effect change”).

<sup>10</sup> See, e.g., Lawrence C. Marshall, *supra* note 9, at 2478; Justice Thurgood Marshall, *supra* note 9, at 5; Tsosie, *supra* note 9, at 500.

<sup>11</sup> See, e.g., Lawrence C. Marshall, *supra* note 9, at 2478; Justice Thurgood Marshall, *supra* note 9, at 5; Tsosie, *supra* note 9, at 500.

<sup>12</sup> ABRAHAM LINCOLN, *Address at the Dedication of the Gettysburg National Cemetery* (Nov. 19, 1863), in *THE LIFE AND WRITINGS OF ABRAHAM LINCOLN* 788 (Philip Van Doren Stern ed., 1940) (stating “that we here highly resolve . . . that this nation, under God, shall have a new birth of freedom.”); see Craig S. Lerner, *Saving the Constitution: Lincoln, Secession, and the Price of Union*, 102 MICH. L. REV. 1263, 1294 (2004) (“Lincoln . . . anticipated that a Union victory in the Civil War would give rise to a ‘new birth of freedom’ and he essentially cast himself in the role of a founder.”).

<sup>13</sup> Lawrence C. Marshall, *supra* note 9, at 2478.

<sup>14</sup> See Sullivan, *supra* note 3, at 221-22 (“Doubtless . . . many originalists, and perhaps

the 1954 Supreme Court decision in *Brown v. Board of Education*<sup>15</sup> declaring segregation in education to be unconstitutional, but would have been quite comfortable with the 1857 Supreme Court decision in the *Dred Scott* case holding slavery to be protected everywhere by the Constitution.<sup>16</sup> Indeed, most of the Framers living at the time were probably surprised that in *Marbury v. Madison*<sup>17</sup> in 1803, Chief Justice Marshall held that the Supreme Court had the power to declare an act of Congress to be unconstitutional.<sup>18</sup> And that, say those opposed to “originalism” is just the point.<sup>19</sup>

In the infinite battle over interpretation, the two adversarial theories, the “dynamic” view and the “originalist” view, continue to spark debate over the flexibility of the Constitution and the intentions

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other commentators as well, would argue that democracy is being damaged by activist judges, and that various rights which we once enjoyed are no more thanks to the Supreme Court’s purposivism.”); see also David S. Gould & Sol Wachtler, *Et Tu Judge Bork?: Will Solipsism Destroy Conservative Ideology?*, 15 *TOURO L. REV.* 1, 16-17 (1998) (stating that Judge Bork has expressed on several occasions that the Framers would be shocked by the decision to keep prayer out of American schools under the cloak of the First Amendment).

<sup>15</sup> 347 U.S. 483 (1954); see Susan J. Brison & Walter Sinnott-Armstrong, *Contemporary Perspectives on Constitutional Interpretation*, 72 *B.U. L. REV.* 681, 681 (1992) (“[A] ruling such as *Brown v. Board of Education* is correct even though the framers of the Fourteenth Amendment did not believe that it would rule out segregated schools.”); see also William G. Merkel, *A Cultural Turn: Reflections on Recent Historical and Legal Writing on the Second Amendment*, 17 *STAN. L. & POL’Y REV.* 671, 692 (2006) (“Chief Justice Warren . . . [in *Brown*] chose to ignore the intent of the framers altogether, because—so says the opinion—it was unfathomable, and unascertainable, or—so we suspect—because the new Chief (rightly) deemed it unpalatable and unjust.”).

<sup>16</sup> See Michael Kent Curtis, *St. George Tucker and the Legacy of Slavery*, 47 *WM. & MARY L. REV.* 1157, 1160 (2006) (“[I]n the 1857 *Dred Scott* decision, Chief Justice Taney insisted that the framers of the Declaration of Independence did not intend to include even free black descendants of slaves.”); see also Gould, *supra* note 14, at 16-17 (stating that although *Dred Scott* was wrongly decided, it clearly reflected the framers’ “original intent”).

<sup>17</sup> 5 U.S. 137 (1803).

<sup>18</sup> *Id.* at 138 (“Congress have not power to give original jurisdiction to the [S]upreme [C]ourt in other cases than those described in the constitution. An act of congress repugnant to the constitution cannot become a law.”).

<sup>19</sup> See Lawrence C. Marshall, *supra* note 9, at 2489 (discussing the notion that Supreme Court justices must apply evolving norms to the Constitution in order to give the old text renewed and relevant meaning).

of its drafters.

### **B. The Impracticability of the Originalist Method: Long-Dead Drafters and Contemporary Matters**

No originalist today can be heard supporting the *Dred Scott* decision, or opposing the *Brown* decision.<sup>20</sup> Not even Justice Scalia has questioned the power of the Supreme Court to hold an act of Congress to be unconstitutional even though no such power is explicitly given to the courts in the Constitution. Even those who support a unitary presidency and claim for the president the right to decide for himself if his actions in certain instances are constitutional, do not deny that the judiciary also has the power to rule on the constitutionality of Congressional legislation.<sup>21</sup>

Thomas Jefferson himself expected there to be a new constitution every other generation precisely so that it could be fine tuned to fit new circumstances and sensibilities.<sup>22</sup> His words written on the Jefferson Memorial state, “[w]e might as well require a man to wear still the coat which fitted him when a boy as civilized society to

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<sup>20</sup> See Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1239 (2006) (“Of course, the end of much originalist scholarship is to justify rather than undercut super precedents such as *Brown* precisely because no one wants them reversed.”); see also William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1052 (2005) (stating that even “Judge Bork, the exemplar of modern originalism” approves of *Brown* “because it was consistent with the original purposes of the Fourteenth Amendment, as applied to modern circumstances”).

<sup>21</sup> See generally Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995).

<sup>22</sup> William C. Heffernan, *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency Test*, 54 AM. U. L. REV. 1355, 1441 (2005) (“Calculating that a generation lasts nineteen years, Jefferson asserted that ‘the earth belongs always to the living’ and that a written constitution should expire, along with public debts and many statutes, after a generation.”).

remain under the regimen of their barbarous ancestors.”<sup>23</sup>

Both methods of constitutional interpretation, give great deference to the actual wording of the Constitution.<sup>24</sup> They differ only over whether it should guide or bind our decisions.<sup>25</sup> But the disagreement between the “dynamic” view and the “originalist” view of the Constitution rarely descends from the theoretical level because a great practical flaw in the “originalist” view exists. Essentially, the central flaw is that the “originalist” view could not be implemented even if we wanted to follow it to the letter. As Law Professor Cass Sunstein put it, “originalism requires us to determine what long dead drafters would think about questions they did not consider occurring in a world they could never have imagined.”<sup>26</sup>

The originalists believe that judges have no business making law and that the Framers of the Constitution should be looked to for the resolution of all legal problems.<sup>27</sup> Of course, the obvious question asked is: How could the views of the Founding Fathers be determined today, more than 200 years after those slave owners

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<sup>23</sup> Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) (inscription on the Jefferson Memorial, Washington, D.C.).

<sup>24</sup> See Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 645-49 (2005) (discussing that originalism “assumes enduring principles” derived from the Constitution itself, and that the originalist mode of interpretation yields to the Framers’ perceptions rather than those of the current populace); see also Clinton, *supra* note 2, at 1182-83; Lawrence C. Marshall, *supra* note 9, at 2478 (discussing that proponents of the “living constitution” believe that the Framers intended for the Constitution to evolve, and that the Supreme Court is meant to give modern meaning to the text of the Constitution).

<sup>25</sup> See Alford, *supra* note 24, at 645-49; Clinton, *supra* note 2, at 1182-83; Lawrence C. Marshall, *supra* note 9, at 2478.

<sup>26</sup> See Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL’Y 311, 312 (1996) (“For the hard originalist, we are trying to do something like go back in a time machine and ask the Framers very specific questions about how we ought to resolve very particular problems.”).

<sup>27</sup> See Clinton, *supra* note 2, at 1182-83.



viewed America from horse drawn carriages and the decks of tall ships?<sup>28</sup> The originalist icon, Robert Bork, answers the question by saying that the “original understanding” can be gleaned, not only from the words of the Constitution itself, but also “in secondary materials, such as debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like.”<sup>29</sup>

So that is where Bork would have a judge look. But what about the question which is presented where: 1) there is no resource which will disclose exactly what the Framers had in mind or 2) there could be no way of knowing how the Founders would deal with problems involving eavesdropping, or acid rain, or pollution in the Hudson River, or the removal of a feeding tube from a patient’s comatose body, or the vast majority of cases dealing with modern technology and contemporary problems?

Bork has the answer: “The judge who cannot make out the meaning of a provision is in exactly the same circumstance as a judge who has no Constitution to work with. There being nothing to work with, the judge should refrain from working.”<sup>30</sup> The vacuous nature of this observation speaks for itself. The Founders did not envision a judiciary that would “refrain from working.” Indeed, Alexander Hamilton said that the courts will be “the best expedient which can be

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<sup>28</sup> Many individuals critical of the originalist approach have raised this similar question. *See id.* at 1184 (“The absurdity of originalism answering questions that the framers could not conceivably have envisioned convinces . . . nonoriginalists that original understanding on many important constitutional issues is not discoverable and that even if reasonably could be ascertained, it would be wholly irrelevant to constitutional interpretation.”).

<sup>29</sup> ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990).

<sup>30</sup> BORK, *supra* note 29, at 166.

devised in any government to secure a steady, upright, and impartial administration of the laws.”<sup>31</sup>

### C. Recent “Originalist” Decisions: Judicial Activism at its Finest

Those originalists, who have been exposed to the challenge of judging, know very well that deciding a case often requires innovation where a Constitutional mandate, or a statutory provision, or precedent, does not dictate a result. Under those circumstances, a judge cannot “refrain from working.” There is no way that a judge can discharge his or her sacred obligation of deciding a case between litigants without attempting to apply the law and, if the circumstance compels the creating of a new precedent, then that is what must be done. There are thousands of judges in this nation who are challenged every day with the obligation of deciding cases and, more often than not, they have no idea how the Founding Fathers felt about the subject at hand.

Of course there are guidons, such as Jefferson’s admonition that “nothing then is unchangeable but the inherent and unalienable rights of man.”<sup>32</sup> But if the words “activist judges,”<sup>33</sup> dreaded by some Right Wingers, are to be applied to those judges who must decide cases without the benefit of non-existing Constitutional, statutory, or precedential authority, then originalist judges must be described as “activist judges.” None are immune.

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<sup>31</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>32</sup> James Bacchus, *The Garden*, 28 FORDHAM INT’L L.J. 308, 325 (2005).

<sup>33</sup> Sullivan, *supra* note 3, at 221-22.

In the case of *Employment Division v. Smith*,<sup>34</sup> where Native Americans smoked peyote as part of a religious ceremony, Justice Scalia issued a landmark ruling that repudiated the use of the “compelling interest” test—the standard test in freedom of religion cases.<sup>35</sup> Although the issue was not argued or briefed, Scalia formulated a novel “hybrid rights” concept to outlaw the use of peyote which had been used in those religious ceremonies before the Fathers founded anything.<sup>36</sup> Sounds like an “activist judge” legislating from the bench to me.

Then there was the case of *Boyle v. United Technologies Corp.*<sup>37</sup> In that case the father of a Marine pilot, whose son drowned after a helicopter crash, claimed that the helicopter was defectively designed.<sup>38</sup> Scalia wrote the opinion for the Supreme Court, which held that federal common law provided a tort defense to immunize a military contractor from a lawsuit.<sup>39</sup> There is no Constitutional structure, context, or history that would support such a defense. Given the fact that federal courts are not common law courts, it is difficult to understand how Scalia could have fashioned a “federal

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<sup>34</sup> 494 U.S. 872 (1990) (holding that the under the First Amendment’s Free Exercise clause, states do not have to grant exemptions from compliance with neutral laws of general applicability that have an incidental burden on religious conduct, where the law is otherwise valid).

<sup>35</sup> *Id.* at 888 (stating that the “compelling governmental interest” test is not applicable to all actions thought to be religiously commanded, because it would require religious exemptions “from civic obligations of almost every conceivable kind”).

<sup>36</sup> *Id.* at 878 (“It is a permissible reading of the text . . . to say that if prohibiting the exercise of religion . . . is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”).

<sup>37</sup> 487 U.S. 500 (1988).

<sup>38</sup> *Id.* at 502.

<sup>39</sup> *Id.* at 512.

tort law.” As William P. Marshall of the University of Colorado noted, “the judicial activism demonstrated in this case is breathtaking from any perspective. In one fell swoop the court transgressed federalism concerns, ignored separation of powers, and undercut key precedent.”<sup>40</sup> The Right Wing, which cannot abide by “judges who make law,” should know that Justice Scalia makes law. The Right Wing should also know that most judges, when they decide cases, make law.

A gathering of religious Christians may decide to resolve a problem by asking: “What would Jesus do?” It is only when they have to determine what it is that Jesus *would do*, that the meeting falls into hopeless disarray. Not even Justice Scalia’s considerable intellectual talents could fairly tell us what the Framers would say about President Bush’s warrantless wiretapping or the Constitutional rights of Internet users.

It comes as no surprise to either historians or experts on human nature that the Framers themselves could not even agree on either the meaning or original intent of the Constitution.<sup>41</sup> Who today would fault Thomas Jefferson for taking advantage of the unexpected opportunity to purchase the Louisiana Territory in 1803? But the originalists of the time claimed that Jefferson could point to no specific wording in the Constitution that gave him the right to make such a purchase, an accusation that Jefferson himself admitted was

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<sup>40</sup> William P. Marshall, *Conservatives and The Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1231 (2002).

<sup>41</sup> David L. Abney, *Constitutional Interpretation: Moving Toward a Jurisprudence of Common Sense*, 67 TEMP. L. REV. 931, 936 (1994) (“Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular

probably true.<sup>42</sup> Others felt that he was acting properly under powers impliedly given to him in the Constitution.<sup>43</sup>

**D. Today's Supreme Court's So-Called Originalist Judges: Activist Judges in Originalist Clothes?**

If we were to look to the Framers' generation to apply Constitutional principle, then a Supreme Court sitting today would render constitutional a congressional law enacted to prohibit criticism of the president. After all, it was the Framers' generation that passed the 1798 Alien and Sedition Act, which made criminal the writing of any false, scandalous and malicious writings against the government.<sup>44</sup> Benjamin Franklin's grandson was arrested for leveling too "scandalous" a criticism at President Adams.<sup>45</sup> Obviously, those who voted for the Act felt that the First Amendment did not protect a citizen leveling criticism against the government or the president.<sup>46</sup> Today, all of the Justices, even Justices Scalia and Thomas, agree that it is precisely political speech that deserves the

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constitutional provisions, and hid their differences in cloaks of generality.").

<sup>42</sup> Richard J. Dougherty, *Thomas Jefferson and the Rule of Law: Executive Power and American Constitutionalism*, 28 N. KY. L. REV. 513, 524 (2001) ("Jefferson knew that he had a difficult constitutional question that, in all honesty, he would need to confront. The problem Jefferson faced is that the Constitution lacks any specific clause providing for the acquisition of territory by the government.").

<sup>43</sup> *Id.* at 525 (discussing the evidence given to Jefferson in regard to the constitutionality of acquiring the Louisiana Purchase). Moreover, Treasury Secretary Albert Gallatin suggested that "the United States as a nation have an inherent right to acquire territory." *Id.*

<sup>44</sup> Sedition Act of 1798, ch. 73, 1 Stat. 596 (expired 1801).

<sup>45</sup> See Leonard Weintraub, *Crime of the Century: Use of the Mail Fraud Statute Against Authors*, 67 B.U. L. REV. 507, 551 n.66 (1987).

<sup>46</sup> See *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 165-66 (1961) (discussing the suppression of the most basic First Amendment rights by the Alien and Sedition Act).

greatest protection under the First Amendment.<sup>47</sup> And many politicians in 1798 agreed with that view, but not a majority in Congress.<sup>48</sup>

What is an “originalist” to do when even the Framers’ generation could not agree on the meaning of various Constitutional provisions? That would not be a problem if the Framers’ intent was to be a guide to Supreme Court interpretation. But if, as the originalists demand, it is to bind Supreme Court interpretation, then any attempt to find *the answer* of what the Framers intended will often lead to many dogs chasing many tails.

Now let us put Justices Thomas and Scalia to the originalist test. Are they summer soldiers when it comes to originalism? If you read the decision they rendered on the congressionally passed Americans with Disabilities Act,<sup>49</sup> it sure looked like they headed for the tall grass as soon as they saw an originalist result they did not like.

In the case involving the Americans with Disabilities Act, the majority of the Supreme Court, Justices Scalia and Thomas in tow, held that the Eleventh Amendment to the Constitution prohibited a citizen of a state from suing his own state pursuant to a federal statute, thus rendering that significant portion of the act unconstitutional.<sup>50</sup> Putting aside for a moment the fact that Justices

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<sup>47</sup> See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 410-11 (2000) (Thomas, J., dissenting; Scalia, J., dissenting).

<sup>48</sup> See *Communist Party*, 367 U.S. at 161 n.46-48 (discussing the similarity between the arguments in favor of the 1798 Congressional debates on the Alien and Sedition Act and those in favor of the Subversive Activities Control Act).

<sup>49</sup> 42 U.S.C. § 12101 (1990).

<sup>50</sup> *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-76 (2001).

Scalia and Thomas committed the Right Wing sin of “legislating from the bench,” let us examine the Eleventh Amendment. It states in full, “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the States by Citizens of another State or by Citizens or Subjects of any Foreign States.”<sup>51</sup>

The story of the Eleventh Amendment began in 1792 when two citizens of South Carolina acting as executors for a British subject, sued the State of Georgia for a large sum of money.<sup>52</sup> The United States Supreme Court acting within its rights under Article III of the Constitution ordered the State of Georgia to pay the money to the South Carolinians.<sup>53</sup> The name of the case was *Chisholm v. Georgia*.<sup>54</sup> Our founders were unhappy with the results of the Supreme Court decision—they did not want citizens of one State to attack the coffers of another State, so in 1794 they amended the Constitution to forbid the practice.<sup>55</sup>

What is abundantly clear to even a person not versed in the law is that the amendment says, “a citizen of one state cannot sue another state.” It says nothing about prohibiting a citizen from suing his own state in federal or any other court. Nor was the amendment

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<sup>51</sup> U.S. CONST. amend. XI.

<sup>52</sup> *Chisholm v. Georgia*, 2 U.S. 419 (1793).

<sup>53</sup> *Id.* at 479.

<sup>54</sup> *Id.* at 419.

<sup>55</sup> See *Fed. Mar. Comm’n v. S.C. State Port Auth.*, 535 U.S. 743, 752-53 (2002) (“The Amendment clarified that ‘the judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.’ ”); see also *Alden v. Maine*, 527 U.S. 706, 720-22 (1999) (noting the opposition by states such as Massachusetts and Georgia towards such suits).

intended to prevent such suits. In a time when regional interests were strong, the statute was meant to say exactly what it said so as to prevent what happened in *Chisholm*.<sup>56</sup> Even those who believe that the Constitution is a living document subject to constitutional interpretation would stick to the intent, if not actual wording of provisions of the Constitution.

But coming back to the American With Disabilities Act, which was enacted by Congress and enthusiastically signed by the then President George Bush.<sup>57</sup> When the case challenging the law came up to the Supreme Court, the “originalists” on that court suddenly and inexplicably rewrote the Eleventh Amendment to say that it prohibits a citizen of one state from suing *his own* State, thus rendering the most significant provisions of the Act unconstitutional.<sup>58</sup>

If you use your computer search engine to find the reaction to the Americans With Disabilities Act decision, not even a super Google search will turn up one peep of protest from President Bush or any others on the Right Wing who daily swear an undying oath of fealty to originalism.<sup>59</sup> Their paragon judges refused to read the Constitution as written and intended in order to reach a preferred

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<sup>56</sup> *Fed. Mar. Comm’n*, 535 U.S. at 752-53.

<sup>57</sup> Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53 (2000).

<sup>58</sup> *Garrett*, 531 U.S. at 363-64. Justice Scalia and Justice Thomas joined the majority opinion. *Id.* at 359.

<sup>59</sup> See Jeffrey W. Larroca, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams: Disabling the Americans with Disabilities Act*, 19 J. CONTEMP. HEALTH L. & POL’Y 363, 371 (2002). It should be noted that the Americans with Disabilities Act was passed under a Republican administration and included the fervent support of former President George H.W. Bush. *Id.*



result.<sup>60</sup>

It is a bedrock tenet of originalism that the words of the Constitution should be given their plain meaning and decisions should be based on that plain meaning.<sup>61</sup> Let us look at the plain wording of the treasured First Amendment of the Constitution. It states that “[c]ongress shall make no law . . . abridging the freedom of speech.”<sup>62</sup> Yet, in the face of such clear and plain wording, every Justice now on the Supreme Court, liberal and conservative, agrees that the First Amendment does not protect obscene speech.<sup>63</sup> Why? Because the Supreme Court has determined that obscenity is not speech.<sup>64</sup> Really? The definition of speech is: “Expression or communication of thoughts and feelings, by spoken words, vocal sounds, and gestures.”<sup>65</sup>

That definition fits obscenity perfectly, including the part about the gestures. But, according to Justice Scalia, burning the American flag is speech but yelling the famous seven prohibited

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<sup>60</sup> Interpreting the Eleventh Amendment in this manner was not a new concept. See *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779 (1991) (“We have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.”). Notably, Justice Scalia, an ardent originalist, wrote the *Blatchford* opinion. *Id.* at 777.

<sup>61</sup> Thomas Y. Davies, *The Fictional Character of Law-And-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 254 (2002).

<sup>62</sup> U.S. CONST. amend. I states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

<sup>63</sup> *Miller v. California*, 413 U.S. 15, 23 (1973) (“This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.”).

<sup>64</sup> *Id.* The Court held that obscene material is not protected by the First Amendment, such material can be regulated by the States and obscenity is to be determined by applying “contemporary community standards.” *Id.* at 23-24.

<sup>65</sup> BLACK’S LAW DICTIONARY (8th ed. 2004).

words at Justice Scalia for protecting flag burning is not speech.<sup>66</sup> Justice Scalia's distinction between the two instances makes sense, but that distinction violates the basic tenet of originalism to give words their plain meaning.<sup>67</sup>

The originalists claim if the words are clear, a judge need go no further. He should follow the clear meaning of the words and eschew looking into what the law calls the legislative history of the statute or constitutional provision.<sup>68</sup> But here, even if we were to try to fathom the intent of the Framers of the First Amendment with regard to obscenity, the outcome would not be at all clear, particularly if we are fastened to the Framers' generation.

The so-called first erotic novel involving the heroine Fanny Hill was declared obscene in America in the early nineteenth century.<sup>69</sup> It was not until the famous 1966 Supreme Court decision

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<sup>66</sup> *Texas v. Johnson*, 491 U.S. 397, 405 (1989) (noting that Justice Scalia joined the majority opinion).

<sup>67</sup> In *Johnson*, the Supreme Court held that all acts pertaining to the flag are not automatically protected, but the context of the conduct is taken into consideration when determining whether the conduct is expressive conduct and is subject to First Amendment protection. *Id.* at 405-06. Conversely, in *Miller*, the Supreme Court differentiated obscene speech from protected First Amendment speech by holding that obscene material is unprotected by the First Amendment and state regulations must be limited to materials that "do not have serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 23-24. Thus, an "originalist" like Justice Scalia seems to be violating important "originalist" principle of giving words their plain meaning.

<sup>68</sup> William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990). Justice Scalia added:

Although it is true that the Court in recent times has expressed approval of this doctrine [that legislative history can sometimes trump plain meaning], that is to my mind an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity.

*Id.*

<sup>69</sup> *Memoirs v. Massachusetts*, 383 U.S. 413, 415 (1966).

that the book could no longer be “banned in Boston.”<sup>70</sup> Eighteenth century Americans, however, did not have noses nearly as blue as the American nose became in the nineteenth century. Some very raunchy material was readily available throughout the nascent nation. It was said by some that the only thing that made Benjamin Franklin prouder than his discovery of the properties of electricity was that he claimed to have bought the first copy of the memoirs of Fanny Hill in the colonies.<sup>71</sup> And no one ever thought to ban Franklin’s writing: “*Advice to a Young Man on the Choice of a Mistress*,” which was standard reading matter in men’s smoking lounges of the day.<sup>72</sup>

A true originalist could never claim that the word “speech” in the First Amendment did not include obscenities precisely because the Framers did not write in the First Amendment “there shall be no law abridging the Freedom of Speech except Obscene Speech.” Indeed, there was no law in any of the thirteen colonies banning obscenity except for The Bay Colony of Massachusetts, which defined “obscenity” as publications that disparaged *religion*.<sup>73</sup>

As evidenced by contemporary decisional law, even the most ardent defenders of originalism have manipulated the words, or lack thereof, of the Constitution to suit a desired result. Upon examination, it becomes clear that the result oriented Justices of the

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<sup>70</sup> *Id.* at 420.

<sup>71</sup> M. THOMAS INGE, A HISTORY TEACHER: CONCISE HISTORIES OF AMERICAN POPULAR CULTURE 295 (1984).

<sup>72</sup> *United States v. Roth*, 237 F.2d 796, 806 (2d Cir. 1957).

<sup>73</sup> Eric Jaeger, *Obscenity and the Reasonable Person: Will He “Know It When He Sees It?”*, 30 B.C. L. REV. 823, 829 (1989) (“A Massachusetts statute, for example, proscribed ‘obscenity,’ but the prohibition extended only to obscene expression that denigrated religion, rather than to sexual obscenity standing alone.”).

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Supreme Court are guilty of interpreting the Constitution in a manner necessary to accommodate our modern sensibilities.

### **III. DRED SCOTT: THE POSTER BOY FOR THE ORIGINALISTS' VIEW OF THE CONSTITUTION**

The “originalist” approach resulted in the catastrophic *Dred Scott* decision, though originalists refuse to recognize that Chief Justice Taney’s decision was the product of originalism. This Part discusses the negative aspects of originalism as evidenced through the *Dred Scott* case. The impact of the originalist decision on the Nation provides great insight into the maladies of dead-hand control.

#### **A. The Dred Scott Case: The Drafters Dead-Hand Control of Nineteenth Century Decisional Law**

The third rail of the originalists is the *Dred Scott* decision rendered by the United States Supreme Court in 1857. The chilling bottom line of that decision was that black Americans had “no rights that the white man was bound to respect.”<sup>74</sup>

In the *Dred Scott* case, a slave was taken into free territory and then returned to a slave state.<sup>75</sup> The slave claimed that once in free territory, he should be free forever.<sup>76</sup> The *Dred Scott* decision determined that neither a slave nor any free descendent of a slave could be a citizen of the United States or any State therein, and thus, a slave had no standing to bring a lawsuit in an American court.<sup>77</sup>

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<sup>74</sup> *Scott*, 60 U.S. at 407.

<sup>75</sup> *Id.* at 394.

<sup>76</sup> *Id.* at 400.

<sup>77</sup> *Id.* at 407.

No originalists, not even Judge Bork nor President George W. Bush, have stated that they believe that the *Dred Scott* decision was decided according to proper and sound judicial principles, the unfortunate result notwithstanding.<sup>78</sup> They all say that the case was wrongly decided.<sup>79</sup>

If *Dred Scott* was wrongly decided *and* it was decided according to strict originalist principles, then the originalist theory would be fatally wounded. And so, people like President Bush and Judge Bork try to claim that the *Dred Scott* case was not a case decided on originalist principles.<sup>80</sup> But the present day originalists can twist themselves into a judicial pretzel, and it would not change the inarguable and provable truth that the *Dred Scott* decision was decided the way it was, because its author, Chief Justice Roger Taney, stubbornly insisted on sticking to a strict originalist analysis that anchored him to the time and mind set of the Framers of the Constitution.<sup>81</sup>

Chief Justice Taney, then, was following Bork's description of originalism.<sup>82</sup> In fact it was Bork who suggested, as we have

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<sup>78</sup> See David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373, 1404-05 (1990) (stating that Bork was right in citing *Dred Scott* as a mistake that any originalist must explain); see also Washingtonpost.com, Transcript: Second Presidential Debate, [http://www.washingtonpost.com/wp-srv/politics/debatereferee/debate\\_1008.html](http://www.washingtonpost.com/wp-srv/politics/debatereferee/debate_1008.html) (last visited Aug. 17, 2006) (reporting that President Bush proclaims the error of the *Dred Scott* decision was that it was decided on personal opinion rather than strict interpretation of the Constitution).

<sup>79</sup> See Richards, *supra* note 78, at 1404-05; see also Transcript: Second Presidential Debate, *supra* note 78.

<sup>80</sup> See Richards, *supra* note 78, at 1404-05; see also Transcript: Second Presidential Debate, *supra* note 78.

<sup>81</sup> See Richards, *supra* note 78, at 1404-05 (stating that Chief Justice Taney, like Robert Bork, suffers from a view of originalism that rejects his interpretive responsibility as a Chief Justice of the Supreme Court).

<sup>82</sup> See *id.*

already noted, that if you have any doubt as to the original intent of our Founders it can be uncovered “in the words used and in secondary materials, such as debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time and the like.”<sup>83</sup> We have read both the words of the Constitution and the “secondary materials” and there is no question that our Founders, with very few exceptions, considered slaves as chattels.<sup>84</sup>

President Bush tried to explain away the *Dred Scott* case when confronted with it at a Town Hall meeting during the last presidential election by saying that *Dred Scott* was “a personal opinion.”<sup>85</sup> That is not what the Constitution says. The president was wrong on both counts. The originalists’ attempt to lay the *Dred Scott* decision at the feet of an agenda driven pro-slavery Justice rather than at the feet of a stubborn adherent to the doctrine of originalism just will not survive scrutiny.<sup>86</sup>

To begin with, Justice Taney, though far from an abolitionist was also far from a fire-eater, the most radical of the pro-slavery people. In his private practice before becoming Chief Justice, he had defended an abolitionist who had been indicted for inciting a slave insurrection.<sup>87</sup> In that case Justice Taney told the jury that slavery was a great blot on this country.<sup>88</sup> In his personal life, Justice Taney

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<sup>83</sup> BORK, *supra* note 29, at 144.

<sup>84</sup> *Scott*, 60 U.S. at 624-25 (stating that a slave may be known by law simply as a chattel, dependant on the municipal law of the area).

<sup>85</sup> Transcript: Second Presidential Debate, *supra* note 78.

<sup>86</sup> Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 272-73 (1997).

<sup>87</sup> BERNARD C. STEINER, *LIFE OF ROGER BROOKE TANEY: CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT* 73-74 (1970).

<sup>88</sup> *Id.* at 76.

freed his own slaves and even gave a pension to the older ones who could not work.<sup>89</sup> He had been driven further into the pro-slavery camp later in life by what he saw as the radicalism of the abolitionists just as, ironically, his *Dred Scott* decision would drive many into the anti-slavery camp.<sup>90</sup> But Justice Taney was no ferocious supporter of slavery.

What drove Justice Taney was a respect for conservative originalist principles of jurisprudence. The same originalist principles that drove him to author the *Dred Scott* decision as he did, drove him later to prohibit President Abraham Lincoln from suspending the writ of habeas corpus even though the Civil War that was raging threatened Washington D.C. itself.<sup>91</sup> Justice Taney, because he was a principled conservative, would never have countenanced President Bush's use of "war" as a talismanic word to justify virtually any expansion of presidential powers.

When President Bush said that *Dred Scott* was not based on the Constitution, he showed that he may never had read the *Dred Scott* decision or the Constitution. If he had, if he even retrieved his old Yale Cliff Notes on the case, he would have discovered that the *Dred Scott* decision was based squarely on the several explicit provisions of the Constitution that make it clear slaves were

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<sup>89</sup> *Id.* at 55-56.

<sup>90</sup> See WALKER LEWIS, WITHOUT FEAR OR FAVOR: A BIOGRAPHY OF CHIEF JUSTICE ROGER BROOKE TANEY 360 (1965) (stating that Taney believed "it would be a disservice to the Negroes themselves to be thrust suddenly on their own resources").

<sup>91</sup> *Ex Parte Merryman*, 17 F. Cas. 144, 148 (1861) (holding that the section of the Constitution granting the Legislature the right to suspend Habeas Corpus makes no mention of the Executive Department, therefore, the Framers did not intend to extend this right to the President).

considered to be chattel not human beings.<sup>92</sup> To the Framers' credit, they at least had enough shame to refrain from ever using the word "slave" in the Constitution, but a stinkweed by any other name smells just as foul. And there were stinkweeds aplenty in the Constitution.<sup>93</sup>

What is clear from reading the *Dred Scott* decision is that Justice Taney had sympathy for the black Americans and even believed that most of his fellow citizens of his day considered them to be people and not chattel. He pointed out that it is difficult "at this day" to grasp public opinion about that "unfortunate race" at the time of the Constitution.<sup>94</sup>

Justice Taney also pointed out that in his day, people reading the words of the Declaration of Independence that "all men are created equal" would read those words to embrace black Americans, but back in 1776 when those words were written, they did not include that "unfortunate race."<sup>95</sup> But, as a good originalist, Justice Taney put his personal views and views of most of his fellow citizens aside to determine what the Constitution explicitly stated and what the Framers' generation thought about the status of black Americans.<sup>96</sup> His historical survey of the status of black Americans at the time of the Constitution is a *tour de force* of originalist analysis.<sup>97</sup>

The language that Justice Taney used in writing the *Dred*

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<sup>92</sup> U.S. CONST. art. I, §2, cl. 3 (stating that taxes are to be apportioned among states by adding the number of free persons and three fifths for all other persons).

<sup>93</sup> U.S. CONST. art. I, §9, cl. 1 (using the phrase "importation of such persons").

<sup>94</sup> *Scott*, 60 U.S. at 407.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 426.

<sup>97</sup> *Id.* at 407 (stating that in order to determine the status of black Americans one must look to our government, and the government of other nations, to determine who were citizens when the Constitution was adopted).



*Scott* decision sounds like a keynote address at the judicially conservative Federalist Society. Justice Taney wrote, “[i]t is not the province of the court to decide the justice or injustice, of the laws.”<sup>98</sup> He stated that it was the duty of the Court to interpret the Constitution “according to its true intent and meaning when it was adopted.”<sup>99</sup> Robert Bork, in many of his writings, seems to have copied Taney’s words.<sup>100</sup>

Later in the decision, Justice Taney, in essence, denounces the theory of the Constitution as a living document in words that could have been taken right out of the mouth of Justices Scalia and Thomas:

No one we presume supposes that any change in public feeling in relation to the unfortunate race in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed or adopted. Any other rule of construction would abrogate the judicial character of this court and make it the mere reflex of the popular opinion or passions of the day.<sup>101</sup>

### **B. The Lessons of Rigid Originalism: Learning from the Aftermath of the Dred Scott Decision**

Two cases which find unanimity of thought between judicial

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<sup>98</sup> *Id.* at 405.

<sup>99</sup> *Scott*, 60 U.S. at 405.

<sup>100</sup> BORK, *supra* note 29, at 351-52 (1990) (stating that the problems with our judicial system can be resolved by developing an understanding that judges should always be “guided” by the original intent of the Constitution).

<sup>101</sup> *Scott*, 60 U.S. at 426.

liberals and conservatives are the *Dred Scott* case and *Brown v. Board Education*, the case that found that a separate but equal education for black Americans was unconstitutional.<sup>102</sup> However, by applying the originalist principles that President George W. Bush always proudly proclaims, the *Dred Scott* case was correctly decided and the *Brown* case was wrongly decided. For the originalists to admit to that truth would be a concession that originalism should never be used as a straight jacket for judges. Originalists cannot allow any flexibility into their thinking because, by definition, originalism cannot be flexible in applying original intent and explicit text.<sup>103</sup>

There is a lesson that the Right Wing should heed from the *Dred Scott* case in addition to the obvious one that originalism can lead the nation into a train wreck. As Professor Christopher L. Eisgruber of Princeton University observed, “opinion is compelling evidence of how originalism can contribute to injustice.”<sup>104</sup> The lesson that the Right Wing should heed from the *Dred Scott* case, while they are launching their legions at the judicial system, is that the very moment that the more extreme portion of a group’s agenda reaches fruition, often marks a great tactical victory that triggers a strategic defeat stripping the group of most, if not all, of its power.

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<sup>102</sup> *Brown*, 347 U.S. at 495.

<sup>103</sup> Daniel Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1086 (1989).

<sup>104</sup> Christopher L. Eisgruber, *Dred Again: Originalism’s Forgotten Past*, 10 CONST. COMMENT. 37, 48 (1993).

### C. The Remarkable Impact of the Dred Scott Decision on this Nation and its History

The impact of the *Dred Scott* decision should make any person of average intelligence question whether originalism is truly the best means of interpreting the Constitution. This Section discusses both the state of the Nation prior to *Dred Scott* and the historical impact (i.e., the Civil War) of the *Dred Scott* decision.

#### 1. *A Fragile Country: The State of the Nation Prior to Dred Scott*

After President Jefferson bought the Louisiana Territory in 1803, there was a great and heated debate in the nation regarding the expansion of slavery into the newly obtained territory.<sup>105</sup> The volcano was capped and made at least temporarily dormant by the Missouri Compromise of 1820, which set the boundary for slavery at the latitude of thirty-six/thirty degrees.<sup>106</sup> That compromise held until the United States again acquired new land after the Mexican War of 1846.<sup>107</sup> Southern States threatened secession if the balance of slave to free states was thrown out of kilter by the admission of more free states to the Union.<sup>108</sup>

Fortunately, President Zachary Taylor, a military hero of the

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<sup>105</sup> See *Why the Canon Should Be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 254 (2000) (noting that much of the newly acquired territory was conducive to maintaining and expanding slavery).

<sup>106</sup> A. Christopher Bryant, *Stopping Time: The Pro-Slavery and "Irrevocable" Thirteenth Amendment*, 26 HARV. J.L. & PUB. POL'Y 501, 514 (2003).

<sup>107</sup> HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 169 (Cynthia Merman & Roslyn Zinn eds., 2005). As a result of the Treaty of Guadalupe Hidalgo in 1848, "the Texas boundary was set at the Rio Grande River; New Mexico and California were ceded." *Id.*

<sup>108</sup> See BORK, *supra* note 29, at 29 (noting the Congressional practice of admitting

Mexican War, was a strong figure who was also a strong Union man.<sup>109</sup> Like the general before him, Andrew Jackson, he threatened to hang any Southerner who attempted to stir up secession feelings if free states came in without a counterbalance of slave states.<sup>110</sup> President Taylor was a slaveholder but a Unionist first.<sup>111</sup> Unfortunately, he died after only a brief time in office, and his Vice President, Millard Fillmore, though a Northerner, was far more sympathetic to the South and far less able to fill the desperately needed role of a strong president.<sup>112</sup> It appeared that the country was definitely headed to a self-destructive Civil War. No one thought that even the great compromiser, Henry Clay, could make the center hold.<sup>113</sup>

Incredibly, after much marching back and forth from the precipice, Congress cobbled together a series of independent bills known collectively as the Compromise of 1850.<sup>114</sup> No one was entirely happy with its provisions and compromises, but the majority of the country breathed a sigh of relief that disaster had been avoided. The nation needed a respite from living under the Sword of Damocles each day.

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paired slave and free states so that the balance within the Senate was not altered).

<sup>109</sup> ZINN, *supra* note 107, at 153.

<sup>110</sup> See K. JACK BAUER, ZACHARY TAYLOR: SOLDIER, PLANTER, STATESMAN OF THE OLD SOUTHWEST 298 (1985) (stating that Taylor moved closer to the philosophy of the northern radicals as southern intransigence grew).

<sup>111</sup> Herman Belz, *Popular Sovereignty, the Right of Revolution, and California Statehood*, 6 NEXUS 3, 18 (2001).

<sup>112</sup> *Id.* at 19.

<sup>113</sup> William J. Rich, *Lessons of Charleston Harbor: The Rise, Fall and Revival of Pro-Slavery Federalism*, 36 MCGEORGE L. REV. 569, 597 (2005).

<sup>114</sup> Belz, *supra* note 111, at 19.

## 2. *National Turmoil: The Destructive Blow of an Originalist Decision*

The *Dred Scott* decision blew apart the Compromise of 1850. It was even rationally argued by some people at that time, that according to the *Dred Scott* decision no Northern state that had abolished slavery had the right to do so.<sup>115</sup> President Buchanan tried to pre-empt the backlash to the *Dred Scott* decision by secretly and successfully lobbying his fellow Pennsylvanian Justice Grier to join in Justice Taney's decision so that it would not be perceived as a decision by Southern Justices foisted on the North.<sup>116</sup> Buchanan failed to stem the backlash.

The North viewed the *Dred Scott* decision as proof that the South was power hungry and would never feel satiated, not with controlling most of the Congressional Committees, not with the strengthened Fugitive Slave Act, and not with a sound assurance that slavery would not be attacked where it already existed or was allowed to exist under the Compromise of 1850.<sup>117</sup> Mostly, the North was enraged that the delicate peace obtained through the bitter and hard fought Compromise of 1850 now lay in tatters.

The Democratic Party destroyed the Missouri Compromise by ramming the Kansas-Nebraska Act through Congress. This Act allowed each territory, even those North of the Missouri Compromise

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<sup>115</sup> See Mark A. Graber, *Locating the Constitutional Center Centrist Judges and Mainstream Values: A Multidisciplinary Exploration: Dred Scott As a Centrist Decision*, 83 N.C. L. REV. 1229, 1243 (2005) (explaining that the *Dred Scott* decision undermined popular sovereignty at the time).

<sup>116</sup> DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 311-12 (1978).

<sup>117</sup> See Graber, *supra* note 115, at 1235-36 (stating that the *Dred Scott* decision

line, to decide for themselves if they wished to be free or slave.<sup>118</sup> Many Northerners reacted to this perfidy by forming and then joining the new Republican Party.<sup>119</sup> After the *Dred Scott* decision, even Northerners who had heretofore been disinterested or even friendly towards slavery flocked to the Republican Party in such numbers that Abraham Lincoln was able to be elected president even though he received not one electoral vote from the eleven future Confederate States or even the four border states that were to remain with the Union.<sup>120</sup>

In one fell swoop, the originalists' interpretation of the Constitution contributed to the division of nineteenth century society along political and sectional lines, setting the stage for secession and civil war.

#### IV. MODERN SELECTIVE ORIGINALISM: "PENUMBRAS FOR ME BUT NOT FOR THEE"

The *bet noire* of the originalists is the case that legalized abortion: *Roe v. Wade*.<sup>121</sup> That decision was based on the prior case of *Griswold v. Connecticut*,<sup>122</sup> which struck down a Connecticut state law making the use of contraceptives illegal.<sup>123</sup> The *Roe* court found

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exemplifies how the judiciary can interfere with the development of political compromise).

<sup>118</sup> *Id.* At 1250.

<sup>119</sup> Michael Kent Curtis, *John A. Bingham and the Story of American Liberty: The Lost Cause Meets the "Lost Cause"*, 36 AKRON L. REV. 617, 626-27 (2003).

<sup>120</sup> Paul Bourdreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ. L. REV. 195, 232 (2004).

<sup>121</sup> 410 U.S. 113 (1973).

<sup>122</sup> 381 U.S. 479 (1965). In arriving at its privacy-focused decision, the Court asked, "[w]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" *Id.* at 485.

<sup>123</sup> *Id.* at 485-86.

a constitutional right to privacy encompassed, not in the literal words of the Constitution but, as was found in *Griswold*, in the “penumbras” of several of the amendments to the Constitution, collectively named the Bill of Rights—most particularly the Fourth Amendment right to be free from unreasonable searches and seizures.<sup>124</sup> The word “penumbra” would soon enter into the Right Wing lexicon of evil.

Year after year, almost ritualistically, Rush Limbaugh thundered into his microphone that the right to privacy was not in the Constitution, but was merely made up by liberal judges.<sup>125</sup> And then one day a District Attorney in Florida wanted to look at Rush Limbaugh’s medical records to see if he was engaging in unlawful doctor shopping to obtain prescription Oxycotton pills.<sup>126</sup> Those pills may even have had something to do with his severe hearing loss. It is said that when one loses or has one sense diminished, the other

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<sup>124</sup> *Roe*, 410 U.S. at 152. In addition to the Fourth Amendment, the “penumbra theory” also incorporates the First, Fifth, Ninth and Fourteenth Amendments. *Id.*

<sup>125</sup> Rush Limbaugh, “*What is Originalism?*,” in THE LIMBAUGH LETTER (Dec. 2005), available at <http://www.rushlimbaugh.com/home/menu/limfunoriginalism.guest.html>. In one particularly colorful instance, Rush Limbaugh addressed the issue explaining that:

The first guy who discovered the “right to privacy,” Justice William O. Douglas, admitted that it’s not actually in the Constitution. In 1965 Douglas wrote: “Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” If you don’t know what a penumbra or an emanation is, neither does anyone else. They are ridiculous fog words that give liberal judges an excuse to make stuff up. “Okay, it’s not in the actual Constitution; but shazaam! Look! I see it in a ‘penumbra’ - and there it is again, hiding under an ‘emanation.’” This is the way liberals find things in the Constitution that aren’t there, and ignore things that are.

*Id.*

<sup>126</sup> CNN.com, Court Denies Limbaugh’s Appeal: Conservative Radio Host Challenges Seizure of Medical Records, <http://www.cnn.com/2005/LAW/04/28/limbaugh.court/index.html> (last visited July 23, 2006).

senses become more acute. Apparently, when Mr. Limbaugh lost his hearing, it greatly improved his eyesight because he suddenly saw that his copy of the Constitution did have a right to privacy tucked in-between those amendments. In the legal briefs filed on behalf of Mr. Limbaugh to prevent the District Attorney from searching the records, the briefs cited not only to the statutory right to privacy found in Florida law, but also relied on that bugaboo of all cases, *Roe v. Wade*, to bolster Mr. Limbaugh's claim of a right to privacy.<sup>127</sup>

Justice Scalia also seems to have a view that privacy is a personal right, not a group right. That is, privacy applies to him but not to his fellow citizens. In the case of *Texas v. Lawrence*,<sup>128</sup> the Supreme Court found to be unconstitutional a Texas anti-sodomy statute that criminalized homosexual behavior between consenting adults in the privacy of their own home, as well as similarly criminalizing several heterosexual activities that certain sex therapists claimed could have positive effects on a failing marital relationship.<sup>129</sup>

At a public appearance Justice Scalia explained the reason for his ferocious dissent in the *Lawrence* case.<sup>130</sup> During the subsequent question and answer period, a person in the audience arose and asked

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<sup>127</sup> See Brief for American Civil Liberties Union of Florida, Inc. et al. as Amici Curiae Supporting Appellant at 4, 5 n.1, *Limbaugh v. State*, 887 So. 2d 387 (2004) (No. 4D03-4973). In particular, the ACLU argued that the acquisition of medical records through a search warrant issued in an *ex parte* proceeding violates the privacy rights guaranteed by the Florida State Constitution. *Id.*

<sup>128</sup> 539 U.S. 558 (2003).

<sup>129</sup> *Id.* at 578-79 (arguing that personal freedoms under the Constitution progress over time).

<sup>130</sup> Eric Berndt, *Debriefing Scalia*, THE NATION, May 2, 2005, <http://www.thenation.com/doc/20050502/berndt> (last visited Aug. 27, 2006).



what lawyers call a fact-specific question. He asked Justice Scalia if he sodomized his wife at home.<sup>131</sup> The audience was understandably appalled at the question, and even liberal commentators denounced the tasteless and outrageous nature of the query.

Every sentient human being's reaction to Justice Scalia being asked if he sodomized his wife at home would be one of stunned and disgusted disbelief. But was the question really that off base? After all, the reason most people found the question so abhorrent was that . . . well, to put it frankly, whether Justice Scalia sodomized his wife or not was none of anyone's business. The person being questioned, Justice Scalia, had written a decision defending the right of the Government to use all of its power to investigate and prosecute activity occurring between and sometimes even among, consulting adults in the privacy of a home.<sup>132</sup> Justice Scalia had just argued in favor of allowing the Government law enforcement officials to make it their business to criminalize sodomy between Justice Scalia's fellow citizens in the privacy of a home; hence, why was it so untoward merely to ask a question to determine whether Justice Scalia was engaging in the very conduct he claimed the Government had a right to know about?<sup>133</sup> A question from the floor about sodomy from a person with no powers to extract an answer is far less intrusive than an investigation by the Government into sodomy.

The public would have been far less offended if the speaker

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* (stating that Scalia's dissent "would have allowed the state to ask the same question to thousands of gays and lesbians, and to punish them if the answer is yes").

<sup>133</sup> *Id.*

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had asked Justice Scalia if he did drugs at home or counterfeited money at home or engaged in any other endless list of possible criminal activities at home. The question about sodomizing his wife was particularly offensive precisely because consenting sexual conduct is considered to be conduct worthy of the greatest privacy.

Doubtless too, Justice Scalia would have responded to the question with a firm “no” if asked whether he did drugs at home or counterfeited money at home. But when asked the sodomy question, he was struck mute.<sup>134</sup> Apparently, that is a secret he and his wife will take to their graves . . . unless of course his dissent in *Lawrence* becomes the law of the land and his home state law enforcement authorities decide to open an investigation into the goings on in the Scalia home.<sup>135</sup>

Rush Limbaugh is not the only originalist sawing off the limb from underneath his own feet. When the originalist Bush Administration claimed presidential constitutional powers never claimed before, it responded to criticism by claiming that such powers as the right to wiretap or look into banking records without a warrant or permission from Congress were implied by the provision of the Constitution making the president commander in chief and the green lighting of “the use of force if necessary” before the Iraq incursion.<sup>136</sup> The entire unitary theory of the presidency, supported

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<sup>134</sup> *Id.* (“Scalia demurred and law school administrators promptly turned off Berndt’s microphone.”).

<sup>135</sup> *Lawrence*, 539 U.S. at 605-06 (quoting Justice Stewart in arguing that neither the Bill of Rights nor the Constitution guarantees a “general right to privacy”).

<sup>136</sup> Authorization For Use Of Military Force Against Iraq Resolution Of 2002, Pub. L. No. 107-243, 116 Stat. 1498, 1500 (2002).

by most Right Wingers, claims for the president the unheard powers of relying upon the interplay of various provisions of the Constitution, giving the president the power to see that the laws are “faithfully executed.”<sup>137</sup>

Some supporters of the unitary theory of the president even go so far as to say that the president has powers to declare war even if a threat is not imminent.<sup>138</sup> Article I, Section 8 of the Constitution states that the Congress shall have the power to declare war.<sup>139</sup> No such power is given to the president. Yet, some of those supporting the unitary theory of the presidency have decided to read Article I, Section 8 as allowing the Congress to declare war when the president does not want to declare war.<sup>140</sup> The president’s right to declare war is, that very dirty word, “implied” by his powers as commander in chief and chief executive.<sup>141</sup>

James Madison, the father of the Constitution, wrote, “[i]n no part of the Constitution is there more wisdom to be found than in the clause which confides the question of war and peace to the legislature and not to the executive branch.”<sup>142</sup> You originalists want to find out the intent of the Framers? How about the intent of the Father of the

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<sup>137</sup> U.S. CONST. art. II, § 3.

<sup>138</sup> Michael Stokes Paulsen, *The Changing Laws of War: Do We Need a New Legal Regime After September 11?: The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1272-74 (2004) (arguing that the President’s securing of authorization from Congress frustrates the purpose of preemptive action against potential threats).

<sup>139</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>140</sup> Ronald C. Kahn, *The Appointment Power: Presidential Power and the Appointments Process: Structuralism, Legal Scholarship, and the New Historical Institutionalism*, 47 CASE W. RES. L. REV. 1419, 1422-23 (1997).

<sup>141</sup> Paulsen, *supra* note 138, at 1286 (claiming that implied power arises from exceptions to constitutional provisions due to “compelling state interest[s]”).

<sup>142</sup> JAMES MADISON, LETTERS OF HELVIDIUS (1793), reprinted in 4 THE FOUNDERS’ CONSTITUTION 76 (Philip B. Kurland & Ralph Lerner eds., 1987).

Constitution? Is that good enough for you? For so many on the Right Wing to support the unitary theory of the presidency and still claim to be originalists is akin to walking and chewing your feet at the same time. Anyone who can hold views in favor of the unitary presidency and claim he is an originalist, squeezes any meaning out of the term originalist.

In a 1991 case involving a law suit against the state of Alaska by Indian tribes which said that the state had cheated them, Justice Scalia wrote that the suit had to be thrown out because it was barred by the Eleventh Amendment to the Constitution, even though he conceded in the decision that neither the wording nor the intent of the Eleventh Amendment supported such an argument.<sup>143</sup> I have already discussed the restatement of the literal words of the Eleventh Amendment. So here we have this principal purveyor of the originalist doctrine requiring that the Constitution be interpreted exactly as it was written, writing that the Eleventh Amendment should be read to stand “not so much for what it says” but for the “presupposition of our constitutional construction which it confirms.”<sup>144</sup> A “presupposition”? That sounds a lot like penumbra-lite. The penumbras that the Supreme Court found in *Roe v. Wade* at least captured the intent, if not the actual wording, of the relevant Constitutional provisions.<sup>145</sup> Presuppositions ignore both the wording

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<sup>143</sup> *Blatchford*, 501 U.S. at 779-80 (acknowledging that Indian tribes, recognized as sovereigns, are not precluded from bringing suit under sovereign immunity).

<sup>144</sup> *Id.* at 779.

<sup>145</sup> *Roe*, 410 U.S. at 129 (stating that appellant’s rights were “embodied in the Fourteenth Amendment’s Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras”).

and intent of the specific provision in favor of some amorphous overarching purpose of the entire Constitution. Such an analysis is enough to drive an originalist to the extremes of hypocrisy.

In short, those “originalists” who call the loudest for the overturn of *Roe v. Wade* appear to have a constitutional philosophy that can be summed up by the phrase “penumbras for me but not for thee.”

## V. CONCLUSION

Any exhaustive study of the decisions of Justices Scalia and Thomas and the positions of President Bush and his amen corner on talk radio will disclose that they are steadfast originalists except when they are not—which is typically when a more “desirable” result can be obtained through a non-originalist interpretation.

Even if we wanted to interpret the Constitution literally, we could not do it. If we cannot even agree what the term “speech” means or what the term “right to declare war” means, what are we to do when we reach the more facially amorphous constitutional terms like “due process of law” and “equal protection of law”? We can easily base decisions on the spirit of those words, but originalists require strict adherence to text and intent. No human being alive can say with certainty what “equal protection of the law” means when applied to, let us say, *de facto* certifying an election in favor of George Bush over Al Gore based on that section of the Constitution.<sup>146</sup>

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<sup>146</sup> Gore v. Harris, No. 00-2808, 2000 WL 1770257, at \*1 (Fla. Cir. Ct. Dec. 04, 2000),

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As I have noted, the hard core originalists ridicule those who favor viewing the Constitution as a living, breathing document which must be read in the context of the present society, while still staying anchored to the provisions' original purpose. It is amusing that those hard core originalists who revel in ridiculing the "living, breathing document" view of the Constitution somehow manage to find some functioning air sacs in those petrified Constitutional lungs when it serves their purpose.

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*rev'd*, Gore v. Harris, 772 So. 2d 1243 (Fla. 2000), *cert. granted*, Bush v. Gore, 531 U.S. 1046 (2000), *rev'd*, Bush v. Gore, 531 U.S. 98 (2000). The Supreme Court added that the Florida recount could not be conducted in accordance with the requirements of equal protection and due process under the current calculation system. *Bush*, 531 U.S. at 110-11.

